Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

WILLIAM JOSEPH TURNER,
Petitioner

v.

JAMES T. WYNDER, Superintendent SCI-Dallas; DAVID W. LUPAS,
DISTRICT ATTORNEY OF LUZERNE COUNTY;
GERALD J. PAPPERT, ATTORNEY GENERAL OF PENNSYLVANIA,
Respondent(s)

On Petition For Writ of Certiorari
To the Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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DATE: May 23, 2005

QUESTIONS PRESENTED

1. Should this Court grant the Writ to correct the erroneous conclusion of the Third Circuit that evidence submitted at trial was insufficient and did not present a substantial constitutional issue where the merits of the issue are debatable among reasonable jurists?

2. Should this Court grant the Writ to correct the Third Circuit's erroneous conclusion that Petitioner was not denied due process by the Court's erroneous instruction on the crime of burglary where such denial of due process presented a substantial question that is debatable among reasonable jurists?

CORPORATE DISCLOSURE STATEMENT

Petitioner is not a corporation and, therefore, does not have a parent, subsidiaries or affiliates that issue shares to the public.

Neither Petitioner nor Petitioner's counsel have any financial interest in this appeal.

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1. This Court should grant the Writ to correct the erroneous conclusion of the Third Circuit that evidence submitted at trial was insufficient and did not present a substantial constitutional issue where the issue of whether Petitioner is legally innocent is debatable among reasonable jurists. 6

2. This Court should grant the Writ to correct the Third Circuit's erroneous conclusion that Petitioner was denied due process by the Trial Court's

erroneous instruction on the crime of burglary. The issue of the denial of due process in this case presented a substantial question that is debatable among reasonable jurists. 10

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Petitioner, William Turner, respectfully asks that the Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit.[1]

OPINIONS BELOW

The unreported Opinion of the United States Court of Appeals for the Third Circuit, *Turner v. Varner*, Third Circuit No. 04-2224 (3d Cir. February 24, 2005), is appended as Exhibit "A". The Third Circuit's April 19, 2005, unreported Order denying *en banc* rehearing is appended as Exhibit "B". The unreported Opinion of the United States District Court for the Middle District of Pennsylvania, *Turner v. Varner*, MD PA CIV No. 00-CV-01025 (M.D. Pa. April 6, 2004) is appended as Exhibit "C".

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1).

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[1]All emphasis herein is supplied unless otherwise indicated. Respondents are referred to as "the Commonwealth".

STATUTORY PROVISIONS INVOLVED

This case involves a request for a Certificate of Appealability under 28 U.S.C. §2253(c)(1)(2), which states, in pertinent part:

> §2253. Appeal
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from —
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Procedural History:

State Court: William J. Turner's counseled Petition for a Writ of Habeas Corpus under 28 U.S.C. §2254 challenged his conviction for Second Degree Murder on March 31, 1981, after a five-day jury trial in the Luzerne County Court of

Common Pleas. The Petition was filed June 6, 2000. In a Memorandum and Order dated March 9, 2001, the District Court dismissed the Petition with prejudice for failure to exhaust State remedies. Thereafter, the Court accepted Petitioner's Motion for Reconsideration and allowed him to proceed with an Amended Petition filed March 19, 2001. On April 6, 2004, the District Court denied the Petition for Writ of Habeas Corpus and denied a Certificate of Appealability. A Notice of Appeal to the United States Court of Appeals for the Third Circuit was filed May 3, 2004. The Third Circuit denied a Request for Certificate of Appealability by Order dated February 24, 2005. The Petition for Rehearing *En Banc* was denied by Order Of April 19, 2005.

Statement of Facts:

On March 31, 1981, after a five-day jury trial, William J. Turner was convicted of Felony Murder for the death of Everal "Ben" Eaton on August 15, 1980, following negligent medical care of a gunshot wound inflicted by Turner during an

encounter between Turner, Eaton and Turner's wife (Cheryl Turner) in the apartment rented to Turner and his wife: 60 Carey Avenue, Apartment #3, Wilkes-Barre, Pa. The conviction for Second Degree Murder was based upon the Commonwealth's contention that William Turner shot Eaton while Turner was committing the felony of Burglary and that he broke into the apartment without license or privilege to assault (scare) his wife. Turner was sentenced to a term of life imprisonment.

In his Petition for Writ of Habeas Corpus under 28 U.S.C. §2254, Petitioner challenged the conviction on two grounds. First, he alleged that the evidence introduced at trial was insufficient to sustain his felony murder conviction because the evidence was insufficient to sustain a conviction for burglary. The second contention was that the Trial Court erroneously instructed the jury on the elements of the crime of burglary.

REASONS FOR GRANTING WRIT

Under 28 U.S.C. §2253(c)(2), a certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right". In order to meet this standard, Petitioner must demonstrate that a reasonable jurist would find the District Court's assessment of the constitutional claims presented to be either debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 1604 (2000). The issuance of a certificate of appealability (COA) does not require showing that the appeal will succeed; accordingly, the Court of Appeals should not decline an application for COA merely because it believes the applicant will not demonstrate entitlement to relief. *Miller-el v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029 (2003). In this case, the Third Circuit, rather than limiting its examination to a threshold inquiry into the underlying merit of the Petitioner's claims, instead dismissed this claim on the merits as determined by the District Court.

1. **This Court should grant the Writ to correct the erroneous conclusion of the Third Circuit that evidence submitted at trial was insufficient and did not present a substantial constitutional issue where the issue of whether Petitioner is legally innocent is debatable among reasonable jurists.**

The underlying offense of the charge of Felony Murder (M-2) against William Turner was burglary as defined at 18 Pa. C.S.A. §3502, which provides: "A person is guilty of burglary if he enters a building or occupied structure, or a separately secured or occupied portion thereof, with an intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter." Pursuant to 18 Pa. C.S.A. §3502, a person who is licensed or privileged to enter does not commit burglary although he or she intends to commit a crime within the premises. *Cmwlth v. Corbin*, 300 Pa.Super. 218, 446 A.2d 308 (1982). Knowledge is not an element of the crime of burglary and, thus, one who is defending against a burglary charge would have no reason to establish that he believes his presence in a building or an occupied structure is privileged or licensed. *Cmwlth v.*

Harrison, 444 Pa.Super. 103, 663 A.2d 238 (1995). In this case, it was the burden of the Commonwealth to prove that Turner was neither licensed nor privileged to enter 60 Carey Ave., Apartment #3. The Commonwealth could not and did not do so. At trial, the evidence presented by the Commonwealth to establish beyond reasonable doubt that Turner had no license or privilege to enter the premises at 60 Carey Avenue was the Marital Settlement Agreement of July 8, 1980. The Agreement did not establish that Turner had no license or privilege to enter the premises. To the contrary, according to the Agreement, 60 Carey Avenue was Turner's address. At no time during the testimony of Cheryl Turner was she asked by the Commonwealth, nor did she ever testify, that Turner had no license or privilege to enter the premises. Because of the failure to prove that Turner was not licensed or privileged to enter 60 Carey Avenue, the evidence of both the burglary and felony murder charges was insufficient as a matter of law. Turner is innocent of felony murder as a matter of law.

The standard of review in assessing the issue of sufficiency of the evidence is "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 243 U.S. 307, 319, reh'g. denied, 444 U.S. 390 (1979).

In this case, no rational trier of fact could have found that William Turner was not licensed or privileged to enter 60 Carey Avenue, Apt. 3, since all of the evidence presented, including the Marital Settlement Agreement, evidence indicating that William Turner continued to pay rent for the premises, and evidence that on at least two occasions prior to August 15, 1980, Turner went to the premises and he and his wife made love showed that in fact Turner was licensed and privileged to be in the apartment. An essential element of the crime of burglary could not be proved at all. William Turner was licensed and privileged to be in the apartment where the shooting occurred, and the Commonwealth did not meet its

burden of proving otherwise at trial. The relevant question is whether, viewing the evidence in a light most favorable to the Commonwealth, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In this case, no rational finder of fact could have found every essential element of burglary and, hence, felony murder, beyond a reasonable doubt, because, as a matter of law, William Turner was privileged to be in 60 Carey Avenue, Apartment 3, on August 15, 1980.

Whether the absence of an essential element of the underlying felony can be established as a matter of law and thus render the evidence of the felony murder insufficient as a matter of law raises a substantial constitutional issue, the merits of which are debatable among reasonable jurists. The issue of whether a jury could have found a fact that legally did not exist in the circumstances necessarily raises the issue of whether any trier of fact (rational or otherwise) could have convicted William Turner of felony murder.

2. **This Court should grant the Writ to correct the Third Circuit's erroneous conclusion that Petitioner was denied due process by the Trial Court's erroneous instruction on the crime of burglary. The issue of the denial of due process in this case presented a substantial question that is debatable among reasonable jurists.**

The Due Process Clause of the Fourteenth Amendment of the United States Constitution prohibits a State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450 (1959); *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2317 (1977); *Mullaney v. Wilbur*, 421 U.S. 84, 95 S.Ct. 1881 (1975). In this case, the failure of the Trial Court to define the terms "licensed or privileged" created a mandatory presumption in the instructions to the jury that William Turner was not licensed or privileged to enter 60 Carey Avenue, Apartment 3, on August 15, 1980, and had the effect of relieving the Commonwealth of

its burden of proving what in all likelihood it could not prove: that the Petitioner was not licensed or privileged to enter the apartment. The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1960).

Federal habeas corpus relief may issue only if the Court finds that an error in the jury charge "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). In this case, the Trial Judge failed to define the terms "licensed" and "privileged" where, as a matter of law, the evidence indicated that William Turner had both license and privilege to enter the apartment.[2]

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[2]The improper charge substantially and injuriously omitted an element of the underlying felony murder charge from both the Commonwealth's proof and the jury's consideration permitting the jury to unconstitutionally convict Turner of felony murder without the Commonwealth proving all essential elements of both burglary and felony murder beyond a reasonable doubt.

The District Court's determination that Turner's own testimony supported a finding that he was no longer licensed or privileged to enter the Carey Avenue apartment was wrong. The test is an objective test, and knowledge is not an element of the crime of burglary. See: *Cmwlth v. Harrison*, 444 Pa.Super. 103, 663 A.2d 238 (1995).

The inaccurate jury charge amounted to an evidentiary presumption that had the effect of relieving of the State of its burden of persuasion beyond a reasonable doubt of every essential element of the crime not only raises a substantial constitutional issue but raises an issue on which this Court has spoken on more than one occasion. The Third Circuit's conclusion "For substantially the reasons given by the District Court, we conclude that jurists of reason would not debate the correctness of the District Court's rejection of Appellant's claims for federal habeas corpus relief on the merits" is an inappropriate deference to the District Court's determination of the merits of Petitioner's claims in view of the established

authority of this Court (*Miller-el v. Cockrell*, supra.), but wrongly concludes that Petitioner failed to make a substantial showing of the denial of a constitutional right.

CONCLUSION

For the reasons stated above, this Court should grant the Writ and review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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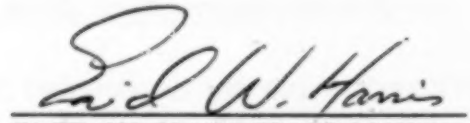
DATED: May 23, 2005

CERTIFICATION OF BAR MEMBERSHIP

I, Enid W. Harris, hereby certify that I am a member of the Bar of the Supreme Court of the United States, having been admitted on November 3, 1993.



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
C.A. No. 04-2224

WILLIAM JOSEPH TURNER

VS.

BENJAMIN VARNER, Superintendent; ET AL.

(M.D. PA. CIV. NO. 00-CV-01025)

Present: SLOVITER, NYGAARD and FUENTES,
Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. §2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

MMW/RAW/slc

ORDER

The foregoing request for a certificate of appealability is denied. For substantially the reasons given by the District Court, we conclude that jurists of reason would not debate the correctness of the District Court's rejection of Appellant's claims for federal habeas corpus

relief on the merits. Accordingly, Appellant has failed to make a substantial showing of the denial of a constitutional right, and his request for a certificate of appealability is denied. See 28 U.S.C. §2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 338 (2003).

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: February 24, 2005
SLC/cc: Enid W. Harris, Esq.
Frank P. Barletta, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-2224

WILLIAM JOSEPH TURNER
Appellant

v.

BENJAMIN VARNER, Superintendent;
DAVID W. LUPAS, District Attorney of the County
of Luzerne; *GERALD J. PAPPERT, Attorney General
of the Commonwealth of PA

*Pursuant to F.R.A.P. 43(c)

SUR PETITION FOR REHEARING

Present: SCIRCA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES, SMITH, and VAN ANTWERPEN, Circuit Judges

The petition for rehearing filed by Appellant William Joseph Turner in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges who participated in the decision of this court and to all other available circuit judges

of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

By the Court,
/s/ Dolores K. Sloviter
Circuit Judge

Dated: April 19, 2005
SLC/cc: Enid W. Harris, Esq.
Frank P. Barletta, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM JOSEPH TURNER,
Petitioner

v.

CIVIL ACTION NO. 3:CV-00-1025

BEN VARNER, ET AL., (Judge Conaboy)
Respondents

MEMORANDUM AND ORDER

Background

William Joseph Turner initiated this petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. By Memorandum and Order dated March 9, 2001, this Court dismissed the petition without prejudice for failure to exhaust state remedies. Thereafter, this Court granted Petitioner's motion for reconsideration and allowed him to proceed on his amended petition.[1]

Turner was convicted of Second Degree Murder

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[1]It is noted that Petitioner is represented by counsel in these proceedings.

following a jury trial in the Luzerne County Court of Common Pleas. He was thereafter sentenced to a term of life imprisonment. Petitioner's conviction and sentence were affirmed on direct appeal by the Pennsylvania Superior Court. See Commonwealth v. Turner, 472 A.2d 252 (Pa.Super. 1984) (Table). A petition for allowance of appeal was denied by the Pennsylvania Supreme Court on May 2, 1984.

In 1996, Petitioner initiated an action pursuant to Pennsylvania's Post Conviction Relief Act (PCRA). After the petition was denied without appointment of counsel or a hearing, the Superior Court remanded the matter for further proceedings. Following appointment of counsel, submission of an amended PCRA petition and an evidentiary hearing, Turner's petition was denied by the Court of Common Pleas. The Superior Court affirmed the dismissal. See Commonwealth v. Turner, 737 A.2d 813 (Pa.Super. 1999) (Table). A petition for allowance of appeal was denied by the

Pennsylvania Supreme Court on June 10, 1999.

Discussion

Turner's amended petition initially claims entitlement to federal habeas corpus relief because the evidence introduced at trial was insufficient to sustain his burglary conviction. Consequently, he argues that his resulting conviction on felony murder charges is unconstitutional. The Petitioner's remaining claim contends that the trial court erroneously instructed the jury with respect to the elements of the crime of burglary.

"The Antiterrorism and Effective Death Penalty Act of 1996 modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that the state-court convictions are given effect to the extent possible under law." Bell v. Cone, 535 U.S. 685, 693 (2002). Specifically, when a federal-law issue has been adjudicated on the merits by a state court, the federal court reverses only when the decision was contrary to, or involved an

unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court. 28 U.S.C. §2254(d)(1).[2] See generally, Gattis v. Snyder, 278 F.3d 222, 234 (3d Cir. 2002); Moore v. Morton, 255 F.3d 95, 104-05 (3d Cir. 2001). The Court has held that the "contrary to" and "unreasonable application" clauses of §2254(d)(1) have independent meaning. Williams v. Taylor, 529 U.S. 362, 404-405 (2000). As explicated in Bell, 535 US. At 694:

> A federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. . . The court

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[2] Specifically, 28 U.S.C. §2254(d)(1) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

> may grant relief under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. . . . The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable . . . .

Furthermore, resolution of factual issues by the state courts are presumed to be correct unless the petitioner shows by clear and convincing evidence that they are not. 28 U.S.C. §2254(e)(1).

In summary, the appropriate inquiry for federal district courts in reviewing the merits of §2254 petitions is whether the state court decisions applied a rule different from the governing law set forth in United States Supreme Court cases, decided the case before them differently than the Supreme Court has done an a set of materially indistinguishable facts, or unreasonably applied Supreme Court governing principles to the facts of the particular case. State court factual findings may be set aside only if rebutted by clear and convincing evidence.

Insufficient Evidence

Petitioner was convicted in the shooting \death of Everal Eaton which occurred on August 15, 1980. By way of background, Petitioner and his wife, Cheryl Turner, rented an apartment on Carey Avenue in Wilkes-Barre during December 1979. On June 21, 1980, the Turners separated with Cheryl moving out of the Carey Avenue apartment. A written marital separation agreement was executed on July 8, 1980. Within this same time period, Cheryl moved back into the Carey Avenue apartment and the Petitioner vacated the premises.

During the early morning of August 15, 1980, Petitioner while armed with a shotgun broke into the Carey Avenue apartment and discovered his wife with Eaton. Following a confrontation with his estranged wife, Petitioner shot Eaton. After undergoing emergency treatment at a local hospital, Eaton died at 6:15 a.m.[3]

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[3]Petitioner has submitted evidence suggesting that Eaton's death was actually the result of negligent medical care.

Petitioner correctly notes that under Pennsylvania state law the crime of burglary includes the element that there was an absence of license or privilege. Turner alleges that the Commonwealth failed to satisfy its burden of establishing that he had no license or privilege to enter the Carey Avenue apartment. Specifically, Petitioner asserts that the only evidence introduced by the Commonwealth was a copy of the Turners' July 8, 1980 Marital Settlement Agreement and that this document did not establish that he had no license or privilege to enter the Carey Avenue apartment on August 15, 1980. Turner adds that because his name was on the lease and he continued to pay the rent, he still had license and privilege to be on the premises.

Respondent counters that during the trial, Cheryl Turner testified that she was living alone at the Carey Avenue apartment. Her testimony added that her husband had voluntarily given up the apartment and their marital separation

agreement included a provision that they would not interfere with each other's peaceful and separate existence. The Respondent adds that Petitioner testified that his wife was the sole occupant of the Carey Avenue apartment. Based on the above, Respondent concludes that there was sufficient evidence to support a charge of burglary.

The standard of review used by a federal court when addressing the issue of sufficiency of the evidence is "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, reh'g denied, 444 U.S. 390 (1979).

Pennsylvania's Superior Court addressed this claim in a Memorandum Opinion dated February 10, 1984. The decision noted that "Mrs. Turner was occupying the marital apartment pursuant to the terms of a separation agreement

executed by the parties on July 8, 1980. Under the terms of the agreement, the appellant was not to interfere with her occupation of that apartment, and he admitted that he had no right to be there." Doc. 9, Exhibit D, p. 3, n.4. Based on those factors, the Superior Court determined that the Petitioner lacked license and privilege to enter the Carey Avenue apartment.[4]

The Superior Court added that while testifying in his own behalf, Petitioner stated that he blamed his wife for ruining their marriage and decided to go to the apartment with a shotgun and scare her. Consequently, the Superior Court determined that the above evidence supported a finding that Turner committed a criminal assault. Furthermore, the

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[4]Petitioner's argument of still having license and privilege also appears to lack merit under Commonwealth v. Majeed, 694 A.2d 336 (Pa. 1997). In that decision, the Pennsylvania Supreme Court held that a spouse could be convicted for burglarizing a home he owned which was presently in his estranged wife's possession pursuant to a Protection from Abuse (PFA) consent order.

evidence that he broke into the apartment[5] for the purpose of perpetrating an assault supported a finding that Turner had committed burglary as defined under 18 P.S.A. §3502(a).

The recitation of the evidence by the Superior Court is corroborated by this Court's independent review of the record. Based on an application of the standards announced in Jackson, there was clearly sufficient evidence that supported the burglary conviction reached by the jury. Petitioner's claim will be denied.

Jury Instructions

In his remaining claim, Turner asserts that the trial court failed to properly instruct the jury with respect to the meaning of burglary. Specifically, he contends that the trial court neglected to provide the jury with specific definitions of the terms licensed and privileged. Petitioner additionally argues

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[5]The Superior Court noted that Petitioner forcefully gained entry into the apartment by smashing a window in the door.

that the failure to define those terms created a mandatory presumption which relieved the Commonwealth of its burden of proving beyond a reasonable doubt that Petitioner was not licensed or privileged to enter the Carey Avenue apartment.

Respondent maintains that the terms licensed and privileged have self-evident meanings, which negated the need for the trial court to provide detailed definitions for both terms. The Respondent adds that since Petitioner's testimony conceded that he was not licensed or privileged to be in the Carey Avenue apartment, the issues of license and privilege were uncontested, further eliminating the need to give specific definitions.

Federal habeas corpus relief may issue only if the court finds that an error in the jury charge "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 623 (1993). In Burger v. Kemp, 483 U.S. 776, 782 n.5 (1987), the Court ruled that jury instructions that may have erroneously shifted the burden of

proof on criminal intent to commit murder did not warrant habeas corpus relief where "'the evidence was so dispositive of intent' that it can be said beyond a reasonable doubt that 'the jury would have found it unnecessary to rely on the presumption.'"

The trial court instructed the jury that one of the elements of murder of the second degree is burglary. It further stated that the jury must find beyond a reasonable doubt that the Defendant entered an occupied structure (the Carey Avenue apartment) with the intent to commit a crime, simple assault. The trial court added in relevant part:

> The next element of burglary is that at the time the Defendant entered 60 Carey Avenue, the premises was not open to the public and the Defendant was not licensed or privileged to enter that property.
>
> If, after considering all of the evidence, you find that the Commonwealth has established all of those elements beyond a reasonable doubt, they you may find that the Defendant committed burglary.

Doc. 11, N.T. p. 582

It is initially noted that this Court disagrees with

Petitioner's contention that the failure to provide the jury with definitions as to the meanings of 'licensed' and 'privileged' created a mandatory presumption. The trial court clearly instructed the jury that an element of the crime burglary was that the Defendant was not licensed or privileged to enter the Carey Avenue apartment. Throughout its instructions the trial court reiterated that the Commonwealth "always has the burden of proving each and every element of the crime charged and that the defendant is guilty of that crime beyond a reasonable doubt." Id. At p. 577; see also N.T. p. 581 ("In order to find that the Defendant committed burglary you must find that all of the following elements have been established beyond a reasonable doubt."). Consequently, this Court disagrees that the failure to provide individual, detailed definitions as to the terms licensed and privileged created a mandatory presumption absolving the Commonwealth of proving each and every element of burglary beyond a reasonable doubt.

While in hindsight, it may have been preferable to provide the definitions, the failure to do so clearly did not erroneously shift the burden of proof. Nor did the omission of those definitions have a substantial and injurious effect or influence as required by Brecht. As in Burger, this Court has already determined that there was sufficient dispositive evidence, most notably Turner's own testimony, to support a finding that he was no longer licensed or privileged to enter the Carey Avenue apartment.

Turner has not shown that the jury instructions relating to the charge of burglary undermined the truth determining process to the extent that no reasonable adjudication of guilt or innocence could have occurred. The instructions given did not erroneously shift the burden of proof as contemplated in Burger. Likewise, Petitioner has not met his burden under Bell of showing that the challenged jury instruction regarding license and privilege was either contrary to, or an unreasonable

application of Supreme Court principles. The petition for writ of habeas corpus will be denied.

AND NOW, THEREFORE, THIS 6th DAY OF APRIL, 2004, IT IS HEREBY ORDERED THAT:

1. The petition for writ of habeas corpus is denied.
2. The Clerk of Court is directed to close the case.
3. Based n the Court's determination herein, there is no basis for the issuance of a certificate of appealability.

/s/ Richard P. Conaboy
United States District Judge

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